STATE OF MICHIGAN

COURT OF APPEALS

FLORENCE DILLARD,

Plaintiff-Appellee,

v

DETROIT BOARD OF EDUCATION,

Defendant-Appellant.

UNPUBLISHED
June 12, 1998

No. 206219
WCAC
LC No. 93-0200

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

On remand from the Michigan Supreme Court for consideration as on leave granted, defendant Detroit Board of Education appeals from a decision of the Worker's Compensation Appellate Commission (WCAC) affirming an award of worker's compensation benefits for plaintiff's back disability. We affirm.

Plaintiff worked as a cleaning person, then as a custodian for the Detroit Public Schools for almost twenty years beginning in 1967. She has a high school diploma and completed an associate's degree in accounting at a community college in 1981. She experienced acute back pain for the first time at work in 1985, and again injured her back at work on October 26, 1987. She stopped working on or about November 6, 1987, because of the pain in her back. Defendant voluntarily paid worker's compensation benefits through May 1988. Plaintiff was then given a disability pension on December 1, 1988.

At about the same time plaintiff injured her back in October 1987, she also became the subject of a discipline proceeding for refusing to perform certain duties. A memorandum pertaining to the proceeding which was prepared by the principal of the school where plaintiff worked was introduced as part of defendant's case. It indicated that there was no job assignment available within the lifting and bending restrictions that plaintiff's doctors recommended. In January 1988, plaintiff went to the personnel department and inquired about job opportunities. Plaintiff claimed that she could be a supervisor of custodians and asked for such a position. No such offer was made, perhaps because no such position existed or because plaintiff was not deemed qualified. Plaintiff has not worked since November 1987.

The worker's compensation magistrate who heard the case originally indicated that depositions were to be taken prior to trial, with plaintiff's experts being deposed before the defense experts. Plaintiff had relied upon the deposition of one physician, while defendant relied upon the depositions of three physicians. However, as trial approached, plaintiff switched lawyers and the new attorney asked for an adjournment and an opportunity to depose two additional doctors. The magistrate permitted plaintiff to depose the two treating physicians, and also permitted defendant to take another deposition. When the two physicians proved unavailable, plaintiff instead deposed a third physician, Lewis Cohen, and also deposed Alvin Brown, the physician that defendant had intended to depose pursuant to the magistrate's permission, but had then elected not to depose at the last minute. Although defendant objected to the testimony of Cohen and Brown, the magistrate admitted both depositions and awarded benefits to plaintiff for her back injury. In the magistrate's opinion, there was no mention of Cohen's testimony. The only mention of Brown's testimony was provided primarily as additional support for a conclusion that the magistrate had already reached.

On appeal, the WCAC affirmed the magistrate's award of benefits. It found that plaintiff was disabled and that there was no indication that there were other jobs available that she could perform. It also found that the magistrate was within her discretion in handling the taking and admission of the depositions and that any error was harmless in light of the other evidence in favor of plaintiff.

This Court's review in a worker's compensation case "does not include an independent review of the magistrate's decision or a substantial evidence review of the facts." *York v Wayne Co Sheriff's Dept*, 219 Mich App 370, 375; 556 NW2d 882 (1996). The limited scope of judicial review is established in Const 1963, art 6, § 28, which provides:

> Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

Similarly, MCL 418.861a(14); MSA 17.237(861a)(14), which provides for review of WCAC decisions, states:

> The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have the power to review questions of law involved with any final order of the commission . . .
>
> Findings of fact made by the WCAC are conclusive if there is any competent evidence in the record to support them. *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992).

Defendant first argues that the WCAC did not apply the correct legal standard of disability in this matter. Disability is defined as:

> [A] limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The

> establishment of disability does not create a presumption of wage loss. [MCL 418.301(4); MSA 17.237(301)(4).]

Haske v Transport Leasing, Inc, Indiana, 455 Mich 628, 634, 655; 566 NW2d 896 (1997), largely resolved the meaning of "disability" in the worker's compensation act, holding that a "disability" would exist if there were a single suitable job within an employee's qualifications and training that he or she could not perform, even if there were other jobs the employee could theoretically perform. To establish a compensable disability, an employee must show "(1) a work-related injury, (2) a subsequent loss in actual wages, and (3) a causal link between the two." *Id.* at 634.

In regard to the first and second prongs of the *Haske* test, there is no dispute that plaintiff suffered a work-related back injury and subsequently did not work, suffering a total loss of wages. Under the scope of the third prong, defendant now argues that plaintiff did not establish the necessary causal nexus because there are other jobs such as a custodial supervisor or a position in the accounting field that plaintiff could perform, but has avoided. Defendant relies on *Haske*'s determination that "[u]nemployment or reduced wages must be causally linked to work-related injury, and a plaintiff may not reject actual wages reasonably offered or avoid or refuse actual wages." *Id.* at 658. However, in our judgment, the WCAC correctly addressed the issue of affirmative rejection of available work: It affirmed the magistrate's findings that defendant never offered plaintiff a job that she could perform, and that there was never any showing that such a job existed, much less one within plaintiff's physical restrictions. Indeed, plaintiff sought work from defendant and was turned away without a position, and defendant offered no explanation that would dispute the findings of the magistrate or the WCAC. In addition, the WCAC found that there was no showing that "there existed actual jobs in the real world available to plaintiff" in the fields of accounting or bookkeeping. Although there may have been accounting jobs available for someone, accounting was not within plaintiff's "qualifications and training" as a custodian -- the "single job" for which plaintiff established her disabling injury. *Id.* at 655. Also, in our judgment, plaintiff's limited training in the accounting field in 1981, followed by a complete absence of work experience, would be unlikely to qualify her for a position now. Thus, we find no reason to dispute the findings of the WCAC on these points.

Defendant further argues that even if plaintiff did not affirmatively reject work, "if plaintiff has not attempted to seek such work, she can only be deemed to have avoided it," and therefore she has not established the required causal nexus. This rule regarding the avoidance of work that defendant attempts to set forth is, for better or worse, not in accordance with the holding of *Haske, supra.* While attempting to clarify its previous holding in *Sobotka v Chrysler Corp (After Remand),* 447 Mich 1; 523 NW2d 454 (1994), the Court in *Haske* rejected the idea that the plaintiff must prove, in order to prevent the court from reducing benefits by the amount of a theoretical wage, that he is no longer "able to earn" any wage from any job, or that "the amount of residual capacity [to earn some wage] is diminished." *Haske, supra* at 660-61. Instead, the plaintiff must only show that he can no longer "perform a single position within his qualifications and training" in order to prove a partial disability. *Id.* at 655. Yet the Court seemed to leave open the possibility that the magistrate could find an avoidance of work, and therefore a lack of causal connection precluding any award, based on its "authority to resolve the credibility question." *Id.* at 661 n 37. While we acknowledge this authority, we find that

since the magistrate, affirmed by the WCAC, "credits testimony that there is a direct link between wages lost and a work-related injury, plaintiff [here] need not prove anything in addition." *Id.* at 661. Indeed, in this case, plaintiff did actively seek work within her physical limitations with defendant, but was turned away without a job. It is not plaintiff's burden to prove that she is not "avoiding work," and defendant has not produced any evidence to show that plaintiff was "malingering." *Id.* at 661 n 38. Since this Court will not redetermine credibility and there is competent evidence showing that plaintiff did not avoid work, the findings of the WCAC are conclusive.

Defendant next argues that it was deprived of due process because the magistrate admitted the depositions of Drs. Cohen and Brown, which were taken after the pretrial deadline set for depositions. We disagree. Worker's compensation tribunals are generally not required to follow the same evidentiary rules that apply to jury trials. *Blozina v Castile Mining Co,* 210 Mich 349; 178 NW 57 (1920). MCL 418.851; MSA 17.237(851) provides that the magistrate "shall make such inquiries and investigations as he or she considers necessary," and MCL 418.853; MSA 17.237(853) adds that "process and procedure under this act shall be as summary as reasonably may be." However, due process requires that parties be "accorded the right to cross-examine the maker of the report unless such right is waived." *Carlisle v General Motors,* 126 Mich App 127, 129; 337 NW2d 4 (1983).

In the case at hand, defendant does not argue that it was not accorded the right to effectively cross-examine both Drs. Cohen and Brown. In fact, Dr. Brown was originally the additional physician that the magistrate permitted defendant to depose. In the analysis portion of her opinion, the magistrate did not mention Dr. Cohen's testimony at all, and mentioned Dr. Brown's testimony primarily as additional support for a conclusion she had already reached. Accordingly, defendant has not shown that it was harmed by the magistrate's procedures regarding the depositions, and further has not demonstrated that this Court should find a due process violation in the fact that defendant's own witness was permitted to testify in favor of plaintiff. Therefore, we find no due process violation in the WCAC's affirmation of the magistrate's exercise of discretion over depositions in this case.

For these reasons, we affirm the WCAC's affirmation of the magistrate's award of worker's compensation benefits to plaintiff.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot